

1 JEFFREY S. BLANCK, ESQ.
2 Nevada State Bar # 3913
3 485 West Fifth Street
4 Reno, Nevada 89503
(775) 324-6640
(775) 323-5944 fax
5 email: jblanck@jeffreyblancklaw.com
6 Attorney for Petitioner

7
8 IN THE UNITED STATES DISTRICT COURT
9
10 DISTRICT OF NEVADA

11 JIM BASS HOLDEN,

12 Plaintiff,

13 **Case No.: 2:14-cv-00894-APG-PAL**

14 **MOTION FOR STAY AND**
ABEYANCE

15 v.

16 RENEE BAKER, Warden, ELY STATE
17 PRISON; and ATTORNEY GENERAL OF
18 THE STATE OF NEVADA,

19 Respondents.

20 Petitioner, JIM BASS HOLDEN ("Holden"), by and through his appointed CJA
21 counsel of record, JEFFREY S. BLANCK ("CJA Counsel"), files this Motion for Stay and
22 Abeyance in the instant federal proceeding and the First Amended Petition for Writ of
23 Habeas Corpus concurrently filed herewith ("Federal Writ") pending the complete
24 exhaustion of remedies and claims in the state courts of Nevada.

25 This motion is made and based on the attached Memorandum of Points and
26 Authorities and the entire file herein.

27 Dated: _____, 2014

28

s/
JEFFREY S. BLANCK, ESQ.,
Attorney for Petitioner

MEMORANDUM OF POINTS & AUTHORITIES

I.

PROCEDURAL BACKGROUND

1. On June 16, 2006, the clerk of the Eighth Judicial District Court of Clark County, Nevada entered a Judgment of Conviction in the case entitled, State of Nevada vs. Jim Bass Holden #2515224, Case No. 04C200945 (Exhibit 1 to Federal Writ).

2. After his jury trial, Holden was found guilty of: Count I, Burglary While in Possession of a Firearm; Count II, Conspiracy to Commit Murder; Count III, Extortionate Collection of Debt; and Count IV, Murder With use of a Deadly Weapon.

3. At Holden's sentencing hearing, the Court sentenced Holden as follows: Count I, 24-120 months; Count II, 24-120 months and Count II to run concurrent with Count I; Count III, 12-24 months and to run concurrent with Counts I and II; and Count IV, life w/o and an equal and consecutive life w/o which is concurrent with Counts I, II, and III; the sentence in Count IV is to run consecutive to the sentences in Case C202943 and Case 214716. Holden is currently serving out his sentence at Ely State Prison.

4. Holden's Notice of Appeal and Case Appeal Statement was filed on July 14, 2006. The Nevada Supreme Court docketed this appeal as Case No. 47698 (Exhibit 15 to Federal Writ).

5. The Nevada Supreme Court filed its Order of Affirmance on October 17, 2007 (Exhibit 17 of Federal Writ) and Remittitur issued on November 13, 2007.

6. Holden, pro se, filed a Petition for Writ of Habeas Corpus (Post Conviction) in the 8th Judicial District Court on August 23, 2008. On November 25, 2008, the court appointed counsel for Holden, Karen Connolly ("Appointed Counsel"). In 2009, the parties filed various stipulations to extend the briefing schedule. On April 9, 2010, Appointed Counsel filed Petitioner Holden's Supplement to Post-Conviction Petition for Writ of Habeas Corpus.

7. The State filed its State's Response to Defendant's Petition for Writ of Habeas Corpus (Post-Conviction) on June 29, 2010. Appointed Counsel requested an

1 evidentiary hearing on this matter, the State did not agree, and on October 6, 2010 the
2 court set oral argument on whether or not to conduct an evidentiary hearing. The
3 evidentiary hearing was set for February 28, 2011. Throughout most of 2011, there were
4 various continuances of the evidentiary hearing by the parties. Thereafter, on October
5 24, 2011, the court ordered that a “trial date” be set in this matter. On April 13, 2012, the
6 evidentiary hearing was held and the court denied Petitioner’s petition. The court filed
7 its Findings of Fact, Conclusions of Law and Order on May 6, 2013.

8. Appointed Counsel filed Appellant’s Notice of Appeal on July 25, 2012
9 and the Case Appeal Statement on July 26, 2012 (Nevada Supreme Court Case No.
10 61362) (Exhibit 21 to Federal Writ - Docket Sheet). Holden’s opening brief was filed on
11 February 27, 2013. The Nevada Supreme Court issued its Order of Affirmance on May
12 13, 2014 (Exhibit 23 to Federal Writ), and Remittitur issued on June 11, 2014.

9. While a decision on Holden’s appeal from the denial of his first state
10 Petition for Writ of Habeas Corpus (Nevada Supreme Court Case No. 61362) was still
11 pending, Holden filed a second Petition for Writ of Habeas Corpus with the 8th Judicial
12 District Court on April 26, 2013 (“Second State Writ”) (Exhibit 24 to Federal Writ).
13 Holden raised a new ground based on new case law regarding plea negotiations and
14 defense counsel’s duty to disclose all formal plea offers from the prosecution. Defense
15 Counsel did not disclose the prosecution’s offer of a plea to Holden which the State
16 claims it was given in Holden’s companion case 04C202943. In Case No. 04C202943,
17 Holden was convicted of Murder with the use of a Deadly Weapon (Count I),
18 Attempted Murder with the use of a Deadly Weapon (Count II), Conspiracy to Commit
19 Murder (Count III), and First Degree Kidnapping with use of a Deadly Weapon (Counts
20 IV and V) (“companion case”). The State’s plea offer included both cases, the
21 companion case and this case, C200945.

10. On July 24, 2013, the State filed its Renewed Response and Motion to
11 Dismiss Defendant’s Petition for Writ of Habeas Corpus (Post-Conviction) in Light of
12 Evidence Produced at Companion Case Evidentiary Hearing (Exhibit 25 to Federal

1 Writ). At the Status Check Hearing on July 31, 2013, the court ordered a briefing
2 schedule: Holden's supplemental brief was due on or before October 30, 2013, State's
3 response due on or before January 6, 2014, and Holden's reply due on or before January
4 21, 2014, and the matter set for argument on January 29, 2014. Appointed Counsel filed
5 her Reply to the State's Renewed Response and Motion to Dismiss Defendant's Petition
6 for Writ of Habeas Corpus (Post-Conviction) in Light of Evidence Produced at
7 Companion Case Evidentiary Hearing on September 25, 2013 (Exhibit 26 to Federal
8 Writ).

9 An evidentiary hearing was held on January 29, 2014; the court granted
10 the State's Motion to Dismiss, stating that the petition was procedurally barred (Exhibit
11 27 to Federal Writ). On March 28, 2014, Holden's Notice of Appeal and Case Appeal
12 Statement was filed with the Nevada Supreme Court (Case No. 65331) (Exhibit 28 to
13 Federal Writ - Docket Sheet).

14 11. On April 22, 2014, a docketing statement was filed by Appointed Counsel
15 in Nevada Supreme Court Case No. 65331 (Exhibit 29 to Federal Writ). The parties filed
16 a Stipulation to Extend Briefing Schedule on August 15, 2014, and the court filed its
17 Order granting the extension on August 22, 2014. Appointed Counsel filed a Motion to
18 Consolidate or for Related Relief and a Request for Extension to File Opening Brief on
19 September 19, 2014. The Nevada Supreme Court filed its Order denying the Motion to
20 Consolidate or for Related Relief and granted Appellant's Request for Extension of
21 Time to File Opening Brief on October 3, 2014. As of this date, briefs have not been filed
22 in this case.

23 12. On June 11, 2014, Holden filed a third Petition for Writ of Habeas Corpus
24 in the 8th Judicial District Court in Case No. 04C200945 (Exhibit 30 to Federal Writ)
25 ("Third State Writ"). The sole ground for this petition was a new ruling by the United
26 States Supreme Court stating that "forensic reports that certify incriminating test results
27 are testimonial in nature and that their admission into evidence is a violation of the
28 confrontation clause." The court also stated that "The accused's right is to be

confronted with the analyst who made the certification.” On July 18, 2014, the State filed its Response and Motion to Dismiss Defendant’s Pro Per Petition for Writ of Habeas Corpus and Opposition to Defendant’s Pro Per Motion to Appoint Counsel.

13. On August 13, 2014 at the hearing on the State's motion, the court ruled that Holden's Motion for Appointment of Counsel was granted for the limited purpose of addressing any new grounds in the successive petition, and the remaining motions were continued (Exhibit 31 to Federal Writ). Appointed Counsel, Karen Connolly withdrew as counsel of record on August 6, 2014. On August 20, 2014 at a status check hearing, the court appointed Holden new counsel, Kristina Wildeveld ("New Appointed Counsel").

14. Holden's New Appointed Counsel filed a supplemental petition to his Petition for Writ of Habeas Corpus on October 1, 2014. On October 3, 2014 (Exhibit 32 to Federal Writ), the court set a briefing schedule, and an evidentiary hearing is set for February 28, 2015. This matter is still pending.

II.

ARGUMENT

A Stay and Abeyance Procedure is Allowed in a Federal Court Mixed Writ Petition

A federal court may not grant habeas corpus relief on a claim not exhausted in state court. 28 U.S.C. 2254(b). The exhaustion doctrine is based on the policy of federal-state comity, and is intended to allow state courts the initial opportunity to correct constitutional deprivations. Picard v. Conner, 404 U.S. 270, 275 (1971) and Johnson v. Cain, 712 F.3d 227, 233 (5th Cir. 2013). To exhaust a claim, a petitioner must fairly present the claim to the highest state court and must give that court the opportunity to address and resolve the issue. Duncan v. Henry, 513 U.S. 364, 365 (1995) (per curiam) and Keeney v. Tamayo-Reyes, 504 U.S. 1, 10 (1992).

Petitioner has two claims that have not been completely exhausted in state district court:

111

(1) Petitioner's Third State Writ in the 8th Judicial District Court regarding a new ruling by the United States Supreme Court stating that "forensic reports that certify incriminating test results are testimonial in nature and that their admission into evidence is a violation of the confrontation clause," and that "The accused's right is to be confronted with the analyst who made the certification." An evidentiary hearing scheduled on this matter which is set for February 28, 2015; and

(2) The appeal (Nevada Supreme Court Case No. 65331) of the 8th Judicial District Court's ruling on Petitioner's Second State Writ regarding the issue of plea negotiations and the failure of trial counsel to present the plea offer to Petitioner which was presented to trial counsel by the prosecution in Petitioner's companion case (04C202943).

Petitioner’s Federal Writ is a mixed petition, containing both exhausted and unexhausted claims (appeal from the denial of his Second State Writ, and a pending evidentiary hearing on Petitioner’s Third State Writ). In Rose v. Lundy, 455 U.S. 509 (1982), the U.S. Supreme Court held that federal district courts may not adjudicate mixed habeas petitions. Rose, 455 U.S. at 518-19. The Antiterrorism and Effective Death Penalty Act (“AEDPA”) preserved the total exhaustion requirement of Rose (see 28 U.S.C. §2254(b)(1)(A)), but also imposed a one-year statute of limitations on the filing of federal habeas petitions (see 28 U.S.C. 2244(d)).

Because of the interplay between AEDPA's statute of limitations and the dismissal requirement established in Rose, petitioners who present federal petitions to federal court with "mixed" petitions run the risk of losing their opportunity for federal review of their unexhausted claims. Rhines v. Weber, 544 U.S. 269, 275 (2005) stating, "If a petitioner files a timely but mixed petition in federal district court, and the district court dismisses the petition under Rose after the statute of limitation under AEDPA expired, this will likely mean the termination of any federal review."

To solve this problem, the court in Rhines condoned the “stay and abeyance” procedure, whereby the district court, rather than dismiss the mixed petition, stays the

1 case and holds it in abeyance while the petitioner returns to state court to exhaust his
 2 previously unexhausted claims. Id. at 276. In order to obtain a “stay and abeyance,” a
 3 petitioner must show: (1) good cause for failure to exhaust the claim in state court, (2)
 4 that the unexhausted claims are potentially meritorious, and (3) the absence of abusive
 5 tactics or intentional delay. Id.: *Jackson v. Roe*, 425 F.3d 654, 662 (9th Cir. 2005).

6 Relying on Rhines, Petitioner requests this Court to stay the Federal Writ while
 7 Petitioner exhausts his two state claims:

8 A. The first unexhausted state claim (Petitioner’s Third State Writ) which is
 9 currently in the 8th Judicial District Court (04C200945) on the limited issue of timeliness
 10 of first post-conviction counsel’s, Karen Connolly (“Ms. Connolly”) failure to challenge
 11 the State’s use of an expert witness under the 6th Amendment Confrontation Clause or
 12 object. This legal issue was not available to Petitioner until recently and at the
 13 conclusion of Ms. Connolly’s representation of Petitioner, rendering Petitioner’s Second
 14 State Writ neither untimely nor successive. The medical examination of the decedent
 15 was performed by Dr. Ronald Knoblock, but because Dr. Knoblock retired prior to trial,
 16 the State called as its witness, Dr. Alane Olson, the substitute coroner testifying on the
 17 basis of an improper foundation. On direct appeal, the claim was denied. However,
 18 trial counsel failed to object to Dr. Olson’s testimony on the basis of the Confrontation
 19 Clause.

20 In Petitioner’s state post-conviction proceeding, this Confrontation Clause
 21 violation was not raised by Ms. Connolly in her supplemental petition, even though she
 22 should have raised it. Despite Petitioner’s desire to do so, Ms. Connolly failed to raise
 23 this issue in her supplement pleading filed on July 12, 2013 and also in her Reply to
 24 State’s Renewed Response and Motion to Dismiss Defendant’s Petition for Writ of
 25 Habeas Corpus (Post-Conviction) in Light of Evidence Produced at Companion Case
 26 Evidentiary Hearing on September 25, 2103. Petitioner cannot now raise this violation
 27 issue for this first time on appeal to the Nevada Supreme Court.

28 ///

1 The Nevada Supreme Court has held that “claims of ineffective assistance
 2 of counsel must be reviewed under the reasonably effective assistance standard
 3 articulated by the U.S. Supreme Court in Strickland, thus requiring the petitioner to
 4 show that counsel’s assistance was deficient and that deficiency prejudiced the
 5 defense.” Bennet v. State, 111 Nev. 1099, 1108; 901 P.2d 676, 682 (1995); Kirksey v. State,
 6 112 Nev. 980, 987; 923 P.2d 1102, 1107 (1996). NRS 174.234.2 requires that notice of a
 7 party’s expert witness must be served on the opposing party no later than 21 days
 8 before trial. While trial counsel noted the need to object to this evidence based on a lack
 9 of evidentiary foundation that a new coroner was testifying as to reports generated by a
 10 retired coroner, this case also presented an obvious Confrontation Clause challenge.

11 This issue is not procedurally barred based on time because it was not a
 12 viable claim until after the conclusion of the briefing in this matter, as Petitioner
 13 expressed his desire to challenge the State’s use of the substitute coroner witness, but
 14 had to rely on Ms. Connolly to raise the matter. Thus, the issue is not procedurally
 15 barred based on time, because it was not a viable claim until after all pleadings and
 16 argument were submitted in this matter. The Findings of Fact, Conclusions of Law and
 17 Order were not decided and filed in the post-conviction matter until February 28, 2014,
 18 and the Notice of Entry of the Order was filed on March 3, 2014. Therefore, the period
 19 in which Petitioner is required to raise this issue started from the Notice of Entry of
 20 Order as it pertains to the objective unreasonableness of post-conviction counsel, Ms.
 21 Connolly’s performance. Petitioner filed his proper person Third State Writ on June 11,
 22 2014, after Ms. Connolly timely filed a Notice of Appeal of the state district court’s
 23 denial on March 28, 2014.

24 B. The second state claim is on appeal is currently in the Nevada Supreme
 25 Court as Case No. 65331). This claim is for a plea offer not being presented to Petitioner
 26 by his trial counsel.

27 In Missouri v. Frye, 556 U.S. __, 132 S.Ct. 1399; 182 L.Ed.2d 379 (2012) and
 28 Lafler v. Cooper, 566 U.S. __; 132 S.Ct. 1376; 182 L.Ed.2d 398 (2012), the United States

1 Supreme Court held that the 6th Amendment right to ineffective assistance of counsel
2 extends to the consideration of plea offers that lapse or are rejected. That right applies
3 to all stages of the criminal proceedings. Id. See also Montejo v. Louisiana, 556 U.S. 778,
4 786; 129 S.Ct. 2079; 173 L.Ed.2d 955 (2009). Petitioner alleges that his trial counsel did
5 not communicate a plea offer to him. Because the claim provides Petitioner with at least
6 some chance of habeas relief, Petitioner's claim satisfies the "potentially meritorious"
7 standard in Rhines.

8 Also, there is no indication that Petitioner engaged in intentional dilatory
9 litigation tactics. AEDPA and federal habeas laws are complex areas for practicing
10 attorneys , and can be impossible to navigate for laypersons. In Pace v. DiGuglielmo,
11 544 U.S. 408, 416-17 (2005), where the Supreme Court acknowledged that a petitioner's
12 "reasonable confusion" about the timeliness of his federal petition would generally
13 constitute good cause for his failure to exhaust state remedies before filing his federal
14 petition. Id. at 416-17.

15 **CONCLUSION**

16 Having met the requirements regarding the above unexhausted state claims,
17 Petitioner respectfully requests that this Court grant Petitioner's Motion for Stay and
18 Abeyance.

19
20 Dated: October 29, 2014

21

/s
22 JEFFREY S. BLANCK, ESQ.,
23 CJA Counsel for Petitioner
24
25
26
27
28

CERTIFICATE OF SERVICE

Pursuant to FRCP 5(b), I certify that on the 29th day of October, 2014, I am an employee of the LAW OFFICE OF JEFFREY S. BLANCK, and that on this day, I caused to be served a true and correct copy of the **MOTION FOR STAY AND ABEYANCE** by:

- U.S. Mail
- Facsimile Transmission
- Personal Service
- Hand Delivery
- Messenger Service
- CM/ECF Electronic Service
- Electronic Mail

addressed to the following:

Catherine Cortez-Masto
Nevada Attorney General's Office
100 N. Carson Street
Suite 3900
Carson City, Nevada 89701-4717
Email: usdcfilings@ag.nv.gov

Michael Bongard
Office of Attorney General
1539 Avenue F
Suite 2
Ely, Nevada 89301
Email: mbongard@ag.nv.gov

/s
GALE SANDERS